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SUPREME COURT
STATE OF WASHINGTON

10 MAY 12 AM 8:09

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NO. 83677-9

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

CITY OF SEATTLE

Respondent,

v.

ROBERT MAY,

Petitioner,

PETITIONER'S REPLY REGARDING THE MOTION TO STRIKE

CHRISTINE A. JACKSON
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A. REPLY TO CITY'S ANSWER TO MOTION

The City cites no authority or valid rationale to support its attempt to present an issue beyond the scope of the review: Whether May's challenge to the applicability of the protection order falls within the scope of those anticipated in *State v. Miller*, 156 Wash.2d 23, 24, 123 P.3d 827 (2005), or was a collateral attack. The court should reject the City's attempt to interject this question now as May was not permitted to address the issue in his supplemental brief. In the alternative, May requests permission to file additional briefing on this question.

May did not include the collateral attack issue in his supplemental brief out of respect for, and compliance with, this court's rules. This was not—as the City accuses—a “calculated” decision. May was precluded by RAP 13.7(b) from addressing an issue not presented in his petition. In contrast, the City failed to file an answer or cross-petition presenting this issue and now seeks to place May at a disadvantage by raising the issue after May's opportunity to present briefing to the court has passed. The City failed to follow the rules and should not be permitted to interject another issue into this case without a fair opportunity for May to respond.

The City cites the commissioner's issue summary as authority for

its position. Nonetheless, the commissioner's phrasing of the issues does not determine the scope of review. The issue page contains the following caveat.

Please note that the Justices have not reviewed or approved the issues or classification, and there can be no guarantee that the court's opinions will address these precise questions.

The City also argues that the restrictions in RAP 13.7(b) and RAP 13.4 do not apply to the supplemental brief of the respondent. This argument ignores the plain language of the rule and this court's application of that rule. RAP 13.7(b) limits the scope of the court's review to those issues raised in the "petition for review *and the answer*." (Emphasis added.)

[T]his court will not address an argument 'raised for the first time in a supplemental brief and not made originally by the *petitioner or respondent* within the *petition for review or the response to petition*.' " Sorenson v. Pyeatt, 158 Wash.2d 523, 543, 146 P.3d 1172 (2006) (quoting Cummins v. Lewis County, 156 Wash.2d 844, 851, 133 P.3d 458 (2006)); RAP 13.7(b).

In re Personal Restraint of Hall, 163 Wash.2d 346, 350, note 4, 181 P.3d 799 (2008) (emphasis added). The rules require both petitioner and respondent to present issues for the court's consideration in the petition for review and the answer. RAP 13.4(c)(5) and (d) ("If the [responding] party wants to seek review of any issue that is not raised in the petition for

review . . . the party must raise those new issues in an answer.”)

Here, the City chose not to file an answer or cross-petition and should not be relieved of the consequences of that decision. *Gossage* is directly on point. There the court declined to address an issue raised by the State when it had neglected to file an answer to the petition for review. State v. Gossage, 165 Wash.2d 1, 6, 195 P.3d 525 (2008). The City attributes this result to the type of relief sought. But no such rationale is found in the court’s concise decision limiting review. Gossage, 165 Wn.2d at 6 (“The State failed to file an answer or a cross petition raising the issue of whether the trial court’s decision was appealable as a matter of right. . . . Therefore, this issue is not properly before us and we decline to address it.”)

The City also relies on authorities which permit affirmance of a trial court’s decision on alternative grounds. RAP 2.4; State v. Bobic, 140 Wn.2d 250, 257-58, 996 P.2d 610 (2000); State v. Carter, 127 Wn.2d 836, 904 P.2d 290 (1995). These cases do not address the rules governing the scope of discretionary review by this court. The City’s application of the former here threatens to swallow the restrictions in the latter. The City’s argument permits and encourages responding parties to

ignore the rules governing the scope of discretionary review by this court.

B. CONCLUSION

May respectfully asks this court to grant the motion to strike. The City should not be rewarded for its failure to comply with the rules. May should not be disadvantaged for his compliance with the rules. If the court chooses to consider whether May's challenge to the protection order falls squarely within those challenges approved in *State v. Miller*, 156 Wash.2d 23, 24, 123 P.3d 827 (2005), or is an impermissible collateral attack, May respectfully asks this court leave to file additional briefing on this question.

Respectfully submitted this 12th day of May, 2010,

Christine A. Jackson WSBA #17192
Attorney for Petitioner May

OFFICE RECEPTIONIST, CLERK

To: Christine Jackson; Richard Greene
Subject: RE: City of Seattle v. May, No. 83677-9

Rec. 5-12-10

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From: Christine Jackson [mailto:jacksonc@defender.org]
Sent: Wednesday, May 12, 2010 6:53 AM
To: OFFICE RECEPTIONIST, CLERK; Jackson, Christine; Richard Greene
Subject: City of Seattle v. May, No. 83677-9

To all,

Please find attached for filing Petitioner's reply to the City's answer to the motion to strike in City of Seattle v. May No. 83677-9.

Yours,

--

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